

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LINDA RAY</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>VENATOR GROUP</b>	)	
Respondent	)	Docket No. 264,850
	)	
AND	)	
	)	
<b>LUMBERMEN'S MUTUAL</b>	)	
<b>CASUALTY CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the Award denying post award medical treatment dated April 4, 2005, entered by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board placed this appeal on its summary calendar for determination without oral argument.

**APPEARANCES**

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Michelle Daum Haskins of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board considered the record set forth in the ALJ's Award and, in addition, the transcript of the September 24, 2003, settlement hearing, including the exhibits, together with the documents contained in the administrative file maintained by the Division of Workers Compensation.

### ISSUES

This is a post-award proceeding for additional medical treatment.<sup>1</sup> The ALJ determined “that the Claimant has failed to meet her burden to establish either that she is in need of prescription medications or that any need for psychiatric treatment is related to the injuries she suffered in this docketed claim.”<sup>2</sup>

Respondent is not providing claimant with any authorized medical treatment. On appeal, claimant submits

she has proven she presently is in need of medication [sic] to control pain and depression resulting from her work-related bilateral foot and low back injuries. Accordingly, claimant respectfully requests the Board to reverse the ALJ’s Post-Award Medical Award and grant claimant’s request for an order authorizing Dr. Michael Schuster to provide appropriate prescription medications to manage claimant’s pain and authorize Dr. Ethan Bickelhaupt to provide appropriate prescription medications to manage claimant’s depression.<sup>3</sup>

Conversely, respondent contends that claimant has failed to prove she is in need of prescription medications as a result of her work-related injuries and, therefore, the ALJ’s denial of post award medical treatment benefits should be affirmed.

The issue before the Board is whether claimant is in need of additional medical treatment for her work-related injuries.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant suffered a series of repetitive trauma injuries to her feet and low back during her employment with respondent. The ending date for that series of accidents was March 27, 2001. Claimant last worked for respondent April 23, 2003, and has not worked for any employer since that date. The parties settled the claim before Special Administrative Law Judge Philip R. Shaffer on September 24, 2003. That settlement provided for the payment of

the lump sum of \$70,000 on a strict compromise of the issues, including nature and extent of disability, all claims for past and future compensation, unauthorized medical, and review and modification. The claimant’s rights to future medical are

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<sup>1</sup>Form K-WC E-4 Application for Post Award Medical (Aug. 16, 2004).

<sup>2</sup>Award at 3 (April 4, 2005).

<sup>3</sup>Claimant’s brief at 9 (filed April 28, 2005).

left open upon either agreement or by application. Settlement is equivalent to an approximate 48 percent work disability.<sup>4</sup>

At the time of the settlement, claimant had a separate workers compensation claim pending against the same respondent that related to her “hands, elbows and shoulder and upper back.”<sup>5</sup> Those alleged injuries were not a part of the settlement in this docketed claim. The \$70,000 lump sum payment was in addition to the \$17,948.37 in temporary total disability compensation and \$39,031.52 in medical and hospital expenses that had already been paid by the respondent.

On April 14, 2003, claimant was released to return to full time work by James S. Zarr, M.D., the authorized treating physician, with the restriction that she perform sedentary work only. Dr. Zarr recommended “further therapy for her back and feet followed by a work hardening program” but indicated that claimant “was not interested in this treatment approach. Therefore I now feel she has reached maximum medical improvement.”<sup>6</sup> Dr. Zarr renewed claimant’s prescription for Celebrex but did not schedule claimant to return for any follow-up visit.

Claimant testified that she was also taking Trazodone, Darvocet and Ultram, in addition to the Celebrex, at the time of her settlement and that these medications were all for her back and feet conditions.<sup>7</sup> Claimant returned to Dr. Zarr on November 25, 2003, for evaluation of her continued complaints of pain in the low back and both feet. Dr. Zarr’s report of that evaluation states:

On examination her findings are the same as when I last saw her in April of 2003. I still having [*sic*] nothing further to offer her in the form of treatment. I simply renewed her medications which were Celebrex 200 mg p.o. q.d., Ultram 1-2 tabs p.o. q. 4 hours p.r.n. in pain, Darvocet N 100 1-2 p.o. q. 4 hours p.r.n. in pain, and Trazodone 100 mg p.o. q. h.s. I also wrote a prescription for repair of the broken strap on her plastic ankle-foot-orthosis. There is no need for this patient to return to my office. I have nothing further to offer in the form of treatment.<sup>8</sup>

After her prescription medications ran out, claimant attempted to return to Dr. Zarr but was refused permission. Claimant attempted to relieve her symptoms through over-the-counter drugs, including Advil, Tylenol and Tylenol P.M., but these were not effective.

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<sup>4</sup>S.H. Trans. at 9.

<sup>5</sup>Id.

<sup>6</sup>Id. (Dr. Zarr’s attached office visit note).

<sup>7</sup>P.A.H. Trans. at 11.

<sup>8</sup>Id., Resp. Ex. C.

Claimant said that she was able to function reasonably well with the prescription medications but going without them has limited her ability to function due to pain. She no longer does any of the shopping or housekeeping for her family and rarely cooks. In addition, claimant “had issues with anxiety before [she] got fired from Foot Locker”<sup>9</sup> and since she has been without medication, those problems have gotten a lot worse. She was given samples of an antidepressant medication, Lexapro, by Dr. Bickelhaupt. That medication helped, but she has run out of it and her symptoms have gotten worse. She relates her depression and need for medication to the work-related feet and back injuries because of the pain and the way it limits her ability to function.

Claimant was examined by board certified psychiatrist Ethan E. Bickelhaupt, M.D., on September 20, 2004, at the request of her attorney. Dr. Bickelhaupt diagnosed claimant with “a severe mood disorder and anxiety disorder secondary to both pain and the previous injuries that she sustained in the workplace . . . .”<sup>10</sup> He recommended that she be referred to a psychiatrist for ongoing medication management “to be coupled with appropriate physical therapies and medication related to the treatment of her pain. . . .”<sup>11</sup> Dr. Bickelhaupt also suggested that psychotherapy would be helpful but noted claimant preferred not to undergo such counseling.

On October 26, 2004, at the request of her attorney, claimant was evaluated by Michael Schuster, M.D., who is board certified in pain management and rehabilitation. On examination, Dr. Schuster found claimant to have a limited range of motion with positive straight leg test bilaterally and positive Patrick’s maneuver bilaterally with bilateral hip pain. He also found tenderness to palpation over the lumbar interspinous ligaments and paraspinal muscles bilaterally, bilateral sacroiliac joints and the area over the greater trochanter. In addition, her most intense discomfort was to palpation over the calcaneal area of the left foot and over the medial aspect of the right foot. She had altered sensation over the lateral aspect of the left foot and medial aspect of the right foot, and decreased strength throughout the bilateral lower extremities. He also found trigger points in the bilateral trapezius, bilateral rhomboid, bilateral levator scapulae and right piriformis muscles. His diagnosis was “myofascial pain syndrome; chronic pain syndrome; depression; possible small fiber polyneuropathy, status post tarsal tunnel release; sacroiliac joint dysfunction.”<sup>12</sup> Dr. Schuster recommended additional treatment, including pain management and psychiatric medication. He related claimant’s current symptoms to her work-related injuries.

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<sup>9</sup>Id. at 19.

<sup>10</sup>Id., Cl. Ex. 2 at 2.

<sup>11</sup>Id.

<sup>12</sup>Id.

Claimant was sent by respondent to Chris D. Fevurly, M.D., who is board certified in internal medicine. He performed an independent medical evaluation of claimant on July 16, 2004. Dr. Fevurly reviewed claimant's past medical treatment history and performed a physical examination. His findings include:

In the standing neutral position, the cervical, thoracic and lumbar curves are well maintained. The shoulder and scapular heights are symmetric and the pelvis appears level. There is no muscular atrophy in the upper or lower extremities. There is mild to moderate pain behavior with attempted ROM of the various joints. She is tender in all locations of the torso and upper and lower extremities (not limited to the focal 18 tender points of fibromyalgia).<sup>13</sup>

Dr. Fevurly found generalized tenderness in the cervical spine musculature, the thoracolumbar paraspinals and the lumbar spine musculature, together with mild reduction in all range of motion. He found nonphysiological sensory deficit in the lower extremities and generalized tenderness throughout both lower legs and the left foot. His assessment included chronic regional low back pain without evidence of radiculopathy and generalized muscle tenderness throughout the torso and extremities that does not meet the criteria for fibromyalgia disorder. He found a probable chronic somatoform disorder. Dr. Fevurly's only treatment recommendation was for over-the-counter analgesics. He specifically recommended against the use of narcotic pain medication and opined that "[m]ore aggressive treatment of the underlying psychological and social features may be beneficial but not likely due to the chronic nature of the symptoms."<sup>14</sup> He found claimant to be at maximum medical improvement from her work-related injuries.

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.<sup>15</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>16</sup> The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.<sup>17</sup>

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<sup>13</sup>Id., Resp. Ex. A at 5.

<sup>14</sup>Id., Resp. Ex. A at 7.

<sup>15</sup>K.S.A. 44-501(1); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 57, 853 P.2d 649 (1993), and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 243, 689 P.2d 871 (1984).

<sup>16</sup>K.S.A. 44-508(g); see also *In re Estate of Robinson*, 236 Kan. 431, 439, 690 P.2d 1383 (1984).

<sup>17</sup>K.S.A. 44-501(g).

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.<sup>18</sup> It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.<sup>19</sup> Causal relation is a necessary element in establishing liability under a workers compensation claim, and it cannot be presumed but must be proven by a preponderance of evidence.<sup>20</sup> A psychological injury is compensable under the Workers Compensation Act if it is directly traceable to a compensable physical injury.<sup>21</sup>

Claimant has proven that she has ongoing pain and disability from her work-related physical injury. In addition, she has developed a psychological condition, namely depression, as a direct result of that pain and disability. Respondent has failed to prove that claimant's conditions and need for medical treatment are due to any subsequent injury or intervening cause. Both times claimant saw Dr. Zarr and he said he had nothing further to offer her by way of treatment, he also renewed her prescriptions for pain medication. This is inconsistent and supports claimant's contention that she needs those medications. Prescription medications are medical treatment, and there needs to be an authorized physician to prescribe and monitor the medications.

The recommendations for additional medical treatment may not be directed toward a cure, but there is no question but that claimant is suffering from depression and chronic pain and is in need of treatment. It will afford at least some palliative relief from her pain and reduce the effects of her injuries. The ALJ's Order discontinuing treatment is reversed. Accordingly, respondent is directed to provide claimant with a list of three psychiatrists from which claimant is to select one to be her authorized treating physician.

### **AWARD**

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<sup>18</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 513, 949 P.2d 1149 (1997).

<sup>19</sup> *Nance v. Harvey County*, 263 Kan. 542, 549, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973). See also *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263, rev. denied 261 Kan. 1082 (1996).

<sup>20</sup> See *Drake v. State Department of Social Welfare*, 210 Kan. 197, 204, 499 P.2d 532 (1972).

<sup>21</sup> *Gleason v. Samaritan Home*, 260 Kan. 970, 926 P.2d 1349 (1996); *Followill v. Emerson Electric Co.*, 234 Kan. 791, 674 P.2d 1050 (1984).

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated April 4, 2005, is reversed, and respondent is ordered to provide claimant with additional medical treatment.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director